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No. 84-770

In The
Supreme Court of the United States
October Term, 1984

SAVE MART OF MODESTO, INC.,
Petitioner,

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 126,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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In opposition to the Petition for Writ of Certiorari, Respondent United Food and Commercial Workers Union, Local 126, AFL-CIO (hereinafter "Local 126" or "Union") has filed a Memorandum suggesting that the case is moot, there is no potential conflict with the National Labor Relations Act, the arbitrator was not empowered to determine a representational issue, and accordingly, certiorari should not be granted. For the reasons set forth below, these suggestions are incorrect and should be rejected.

I.

The Status Of The Arbitration Proceeding Is Irrelevant.

The issue presented to this Court is whether the District Court had jurisdiction under Section 301 to issue an order compelling aribtration and not whether the decision rendered by the arbitrator is valid. The arbitration award is of no value if arbitration was improperly ordered in the first instance. *Haig Berberian, Inc. v. Cannery Warehousemen,* 535 F.2d 496 n. 1 (9th Cir. 1976). As held by the Sixth Circuit in *American Bell, Inc. v. Telephone Workers,* 736 F.2d 879, 116 LRRM 2673 (1984):

> "The Union argues that the issue in this appeal is moot because (1) the arbitrator has already held hearings on the disputed question of ABI's obligation under the collective bargaining agreement, and (2) ABI is admittedly bound by the bargaining agreement, whatever this court may decide, with respect to several thousand former Bell employees transferred to ABI in January of this year. We agree with ABI that the issue in this appeal is not moot. ABI has presented this court with the question whether it is bound by the bargaining agreement on the

> basis of Bell's transfer of assets, and whether it must therefore arbitrate disputes about its employment practices. This question is antecedent to any issue that the arbitrator may decide, and in fact will determine whether the arbitrator has jurisdiction. *The status of the arbitration proceedings is therefore irrevelant.*" (Emphasis added.) 116 LRRM at 2676-2677.

The Union's argument that this issue may now be litigated in a related proceeding to confirm the arbitration award[1] is simply incorrect. Having previously challenged arbitrability, Save Mart may have no standing to raise the objection in a subsequent proceeding. *George Day Construction Co. v. Carpenters Local 354*, 722 F.2d 1471 (9th Cir. 1984). The law of the case has been established.[2]

II.

The Union's Assertion Of Mootness Is Disingenuous And The Legal Question Is Subject To Repetitive Litigation.

The Union fails to inform the Court that presently pending between the parties are at least five other grievances involving additional stores and raising the identical issue presented by this Petition. The "dispute" is not over merely because this particular arbitration proceeding

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[1] On January 15, 1985, the Union filed with the United States District Court for the Northern District of California a petition to confirm the arbitration award rendered. The case has been assigned case no. C-85-0443 MHP.

[2] Nor do we understand the Union's contention to be an offer to waive any objection it may have to such a defense under *George Day Construction Co. v. Carpenters Local 354, supra.*

has been completed. *See Abood v. Detroit Board of Education,* 431 U.S. 209 (1977).

Moreover, Save Mart sought a stay of the Order Compelling Arbitration from both the District Court and the Court of Appeals. Both courts denied that request presumably because by bringing "the therapy of arbitration . . . to bear in a complicated and troubled area" the entire dispute might have been resolved. *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261 (1964). Indeed, the Union's prior suggestion of mootness to the Ninth Circuit Court of Appeals was rejected.

Arbitration, by its very nature, is an expeditious process which will always terminate before judicial proceedings can be completed. If issues about the underlying validity of the process cannot be raised merely because the arbitration proceeding itself has been completed, those issues will evade effective judicial review. It is well-established that an action is not moot if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 515 (1911); *see also Weinstein v. Bradford,* 423 U.S. 147, 149 (1975).

The courts have long recognized that the inability to undo past acts does not moot a controversy where the past acts have present or future consequences that can be reached by a judgment. *See Jones v. Snead,* 431 F.2d 1115 (8th Cir. 1970). A decision by this Court holding that Section 301 does not grant jurisdiction over representation issues would effectively nullify any arbitration award issued in this case, thus making this a live controversy subject to this Court's review. *Haig Berberian, Inc. v. Cannery Warehousemen, supra,* at n. 1.

III.

The Proceedings Before The National Labor Relations Board Are Irrelevant.

This Petition raises the important question of whether a court may permit an arbitrator to make bargaining unit and representation determinations which a court itself may not make. Local 126 seeks to ignore this issue and instead focuses on whether or not the National Labor Relations Board (NLRB) has made a final determination which, in turn, precludes the possibility of conflicting decisions. Despite Local 126's protestations to the contrary, many of the issues underlying this case are not now, and have never been before the NRLB. To the extent there has been some overlap, the NLRB has not issued a final determination.

In its Counterstatement of the Case, Local 126 repeatedly asserts that the NLRB has taken various actions. *Passim.* Local 126 failed to differentiate between decisions of the NLRB and decisions of the NLRB's General Counsel. While the former are binding law entitled to collateral estoppel or res judicata effect, the latter have no value whatsoever. *Courier-Citizen Co. v. Electrotypers Local 11,* 702 F.2d 273, n. 6 (1st Cir. 1983); *Edna Pagel, Inc. v. Teamsters Local 595,* 667 F.2d 1275 (9th Cir. 1982); and *Paramount Transportation System v. Teamster Local 150,* 436 F.2d 1064 (9th Cir. 1971).

As stated by Local 126, the unfair labor practice charge filed by Save Mart was dismissed by the General Counsel. Accordingly, that dismissal is of no moment. Additionally, the unfair labor practice charge filed by Local 126 alleging only that Petitioner improperly failed

to transfer employees to the newly opened Hanford store has been deferred to the pending arbitration proceedings. This preliminary deferral decision was made pursuant to the NLRB's longstanding policy, as set forth in *Dubo Manufacturing Corp.*, 142 NLRB 431 (1963), of deferring to court-ordered arbitration. The "RM" representation petition filed by Save Mart to allow its employees an opportunity to exercise their Section 7 rights was dismissed solely because Local 126 did not at that time claim to represent the employees in the Hanford store. Finally, the "UC" petition, which would have allowed the Board an opportunity to determine the bargaining unit and representation issues, was dismissed, *without prejudice*, as being premature. Thus, the NLRB has not made a determination upon the question of the appropriate bargaining unit or the representation rights of Local 126.

As can be seen from the Union's Counterstatement of the Case and the discussion above, the NLRB's Regional Office relied upon the District Court's order to arbitrate, pursuant to the Board's *Dubo Manufacturing Corp.* doctrine, in issuing its deferral letter.[3] Therefore, the NLRB

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[3] Local 126's claim that it filed an unfair labor practice charge asserting that the employers failed to apply the Agreement at the Hanford store is a misstatement of the facts. (Memorandum, p. 6.) Local 126's allegations were as follows: "Within the last six months preceding the filing of this charge, the above-named employer has unilaterally repudiated past practice and the terms of the collective bargaining agreement by refusing to transfer employees to the newly opened Hanford store. In addition, the employer has discriminated against employees on account of their Union activities and/or membership." (Basis of the charge as filed by Local 126 in NLRB Case No. 32-CA-5774, dated August 8, 1983.)

has not focused upon the bargaining unit or representation issues raised by the instant Petition. Neither has the NLRB had an opportunity to determine that a Regional Office perfunctory deferral decision, issued pursuant to *Dubo Manufacturing Corp., supra,* is consistent with this Court's determination in *South Prairie Construction Co. v. Local No. 267, Int'l. Union of Operating Engineers,* 425 U.S. 800 (1976) (*per curiam*), that the protections embodied in Section 157 of the Labor-Management Relations Act would be maintained by deferring bargaining unit and representation issues to private arbitration.

Of equal significance is that but for the District Court's order of arbitration, the NLRB would have exercised its primary jurisdiction to determine the representation issues involved herein. There can be no serious dispute that the unit clarification ("UC") petition would have been processed and the bargaining unit issue resolved had not the District Court issued the order to arbitrate. Finally, absent such an order to arbitrate, the Board would have had an opportunity to determine whether or not Local 126 had sustained its burden of affirmatively demonstrating that it represented a majority of those employees. For these reasons and each of them, Local 126's suggestion that the NLRB has affirmatively deferred its representational jurisdiction to private arbitration should be rejected.

In a related yet equally unavailing argument, Local 126 seeks to distinguish this case on the ground that there exists no inconsistent board determination, relying upon *United Food & Commercial Workers Union v. Alpha Beta,* 736 F.2d 1371 (9th Cir. 1984); *Hospital & Institutional Workers Union Local 250 v. Marshall Hale Memorial Hos-*

pital, 647 F. 2d 38 (9th Cir. 1981); and *Haig Berberian, Inc. v. Cannery Warehousemen, supra.* Local 126's reliance upon *Alpha Beta* and *Marshall Hale* is misplaced for the simple reason that neither of those cases raise representation issues. *Haig Berberian* is of no value for the reason that it was decided prior to *South Prairie* and the Ninth Circuit's later decision in *Local 3-193 v. Ketchikan Pulp Co.,* 611 F.2d 1295 (9th Cir. 1980).

Finally, Local 126 seems to suggest that while it would be inappropriate for a court to determine an issue which may ultimately resolve the representation rights of certain employees, it is appropriate for a court, acting under Section 301 jurisdiction, to direct that an arbitrator do the same thing. Recognizing that such a contention is inconsistent with this Court's decision in *Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974), Local 126 asserts that absent a "contrary Board determination" the order to arbitrate was proper. Local 126 does not rely upon any representation case authority for such a proposition, and none currently exists. Indeed, counsel for Local 126 concedes that if the District Court had determined the representation issue, the Union would not have opposed this Petition. Yet nowhere in its Memorandum does Local 126 explain why an arbitrator should possess the derivative power under Section 301 to resolve a dispute beyond the subject matter jurisdiction of a court. Moreover, Local 126 does not dispute that there is an inter-Circuit dispute upon the extent to which federal jurisdiction exists under Section 301 over representation questions within the purview of the NLRB. Only this Court can provide the solution to the problem raised by the in-

stant Petition, and a resolution of the divergent views expressed by the various Courts of Appeal.

IV.

CONCLUSION

For the aforesaid reasons, it is respectfully submitted that the present controversy is not moot, and that the Petition for Writ of Certiorari should be granted to review the important federal questions raised by the Ninth Circuit Court of Appeals' Decision.

DATED: February 20, 1985.

Respectfully submitted,

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